MOTION FILED
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No. 80-2152

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF MISSOURI, *et al.*,
Petitioners,
vs.
CRATON LIDDELL, *et al.*,
and
EARLINE CALDWELL, *et al.*,
and
JANICE ADAMS, *et al.*,
and
BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, *et al.*,
and
THE CITY OF ST. LOUIS, MISSOURI,
and
THE UNITED STATES OF AMERICA,
Respondents.

On Application for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION OF AMICUS CURIAE, SCHOOL DISTRICT OF THE CITY OF LADUE OF ST. LOUIS COUNTY, MISSOURI, FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, WITH BRIEF ATTACHED

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MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

School District of the City of Ladue is a public school district located in St. Louis County, Missouri, and hereby respectfully requests leave to file, as amicus curiae, the attached brief in support of the State of Missouri's Petition for a Writ of Certiorari to the Eighth Circuit Court of Appeals. The grounds for this motion are:

1. The court of appeals' opinions of the February 13, 1981 (Pet. App. A) and March 19, 1981 (Pet. App. B) in *Liddell* v. *Board of Education,* (8th Cir. 1981), both unpublished, affirmed the orders set forth in paragraphs 12(a) and 12(c) of the district court's order of May 21, 1980, as amended. The court of appeal's opinion of February 13, 1981 acknowledges that the paragraph 12(a) and 12(c) orders "arguably" involve the public school districts located in St. Louis County, Missouri, including Movant (Petition at A-14, n.5).

2. Movant's primary concern is that the paragraph 12(c) order threatens Movant's continued existence.

3. Movant did not seek previously to file an amicus curiae brief because on June 23, 1981 the district court ordered termination of further reporting under paragraph 12(c).[1] However on August 24, 1981 the district court entered an order[2] reactivating paragraph 12(c) and granting motions to join as defendants, Movant and other school districts in St. Louis County, Missouri. The court further ordered that the new defendants would be given "a hearing on the 12(c) aspects of this cause, involving both alleged constitutional violations and proposed remedies" on March 1, 1982.

4. Movant was served with process on September 3, 1981 and has diligently worked on the preparation and filing of the attached brief.

5. Movant has presented in its brief reasons for granting the Writ of Certiorari which are not included in other briefs. Movant has endeavored to avoid repetition of arguments previously submitted to the Court in this matter.

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[1] The Brief For The United States In Opposition states, at p. 16, that the order of June 23, 1981 "is being lodged with this Court".

[2] Pet. Supp. Br. App I.

6. With the service copies of this motion and brief, Movant has mailed to all parties requests for consents pursuant to Rule 42.

WHEREFORE, Movant prays that leave be granted to file the attached brief as Amicus Curiae.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE

INTEREST OF AMICUS

The interests of the amicus curiae in this case are as stated in the Motion for Leave to file this Brief, *supra*. If the Order of May 21, 1980, as modified by the Orders of September 17, 1980 and December 19, 1980, is allowed to stand, it will have a clear and significant impact upon amicus, School District of the City of Ladue.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix A to the petition for a writ of certiorari filed by the Petitioners. The opinion of the United States District Court for the Eastern District of Missouri is reported at 491 F. Supp. 351.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on February 13, 1981 and the Court of Appeals denied petitions for rehearing or rehearing en banc on March 19, 1981. A copy of the order denying the petitions for rehearing appears in Appendix B to the petition for a writ of certiorari filed by Petitioners. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This school desegregation case was begun in 1972, when Craton Liddell, his mother, and other members of the Concerned Parents of North St. Louis and their children ("the Liddell plaintiffs") filed a complaint in the United States District Court for the Eastern District of Missouri seeking to represent the class of school children and their parents in the St. Louis, Missouri public school system. Named as defendants were the St. Louis City Board of Education ("the City Board"), its individual members and certain administrators. Plaintiffs alleged that defendants had "effected and perpetuated racial segregation and discrimination" in the operation of the public schools of the City of St. Louis, in violation of the Fourteenth Amendment.

After approximately one year of discovery proceedings, a class was certified. After some one and a half years of negotiation, the Liddell plaintiffs and the City Board entered into a

consent decree which was approved by the District Court. Objections to the consent decree were filed by organizations representing St. Louis City teachers and by a second group of City students and parents ("the Caldwell group") who were joined by the St. Louis chapter of the National Association for the Advancement of Colored People. At this time, the Caldwell group also moved to intervene as parties plaintiff. The District Court denied the Caldwell group's motion to intervene and they appealed. The Court of Appeals reversed. *Liddell* v. *Caldwell,* 546 F.2d 768 (8th Cir. 1976). Although the only issue presented to the Court of Appeals was whether the District Court erred in denying intervention, *id.* at 769, the Court of Appeals stated:

> In view of the difficult problems in working out a meaningful constitutional plan, we suggest to the district court that it invite the United States Department of Justice to intervene, and that the same invitation be extended to the Missouri State Board of Education. We recommend that the parties explore the creation of a bi-racial citizens advisory committee, which has worked so successfully in other areas of the country. The Supreme Court decision in *Milliken* v. *Bradley,* 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974), seemingly deters the merger of two school districts unless racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or unless district lines have been deliberately drawn on the basis of race. However, investigation into the voluntary cooperation of the county in accepting minority transfers should not be overlooked.

Id. at 774 (citations omitted). This Court denied the City Board's petition for a writ of certiorari. *St. Louis Bd. of Education* v. *Caldwell,* 433 U.S. 914 (1977).

By various orders in 1977, the United States, the City of St. Louis, Janice Adams (representing the Concerned Parents for Neighborhood Schools), and Mary Puleo (representing the In-

volved Citizens Committee) were allowed to intervene as plaintiffs. Also during this time, the State of Missouri, the Commissioner of Education of the State of Missouri, and the State of Missouri Board of Education and its individual members were added as parties defendant.

The case proceeded to trial on questions of both liability and remedy. On April 12, 1979, the District Court rendered its decision and found no constitutional violation by any of the defendants. *Liddell* v. *Board of Education of St. Louis,* 469 F. Supp. 1304 (E.D. Mo. 1979) On appeal, the Eighth Circuit reversed and found that the City Board had failed to disestablish the dual school system it had maintained prior to this Court's decision in *Brown* v. *Board of Education,* 347 U.S. 483 (1954). Specifically, the Court of Appeals held:

> The dual school system in St. Louis legally mandated before 1954 and perpetuated by the Board of Education's 1954-1956 desegregation plan, has been maintained and strengthened by the actions of the Board in the years since. The Board's steadfast adherence to a student assignment policy which did not desegregate the schools and its use of intact busing, school site selection, block busing, permissive transfers, and faculty assignments have preserved segregation in the school system.

Adams v. *United States,* 620 F.2d 1277, 1288 (8th Cir. 1980) (en banc).

Although the only question before the Court of Appeals was whether the City Board had effectively created and operated a unitary school system within the City of St. Louis, the Court of Appeals commented:

> Dr. Orfield [an expert witness testifying for the United States] agreed with the Board of Education that an interdistrict remedy funded by the State of Missouri would have

> the best chance of permanently integrating the schools in the metropolitan St. Louis area.[27]

Id. at 1294-95 & n. 27 (citations omitted).

The Court of Appeals remanded the case to the District Court and ordered that the City Board submit a desegregation plan to the District Court and that, after a hearing, a desegregation plan was to be implemented in the City of St. Louis no later than the beginning of the 1980-81 school year. *Id.* at 1295. Only the

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[27] Dr. Orfield testified:

> [T]he most stable kind of plan is a metropolitan-wide proportional enrollment plan * *.
>
> * * * * * * * *
>
> Anything that can be done to involve the suburban districts should be done.

In *Milliken* v. *Bradley*, 418 U.S. 717, 744-745, 94 S.Ct. 3112, 3127, 41 L.Ed.2d 1069 (1974), the Supreme Court stated that, in order for an inter-district remedy to be appropriate,

> it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation.

St. Louis County suburban school districts, pursuant to state law prior to *Brown*, collaborated with each other and with the City of St. Louis to ensure the maintenance of segregated schools. *See* Act of April 9, 1917, 1917 Mo. Laws 498 (repealed 1957) (providing for the "Colored Consolidated High School District" of St. Louis County); Act of February 17, 1865, § 13, 1865 Mo. Laws 170 (repealed 1957) (providing, *inter alia*, for the inter-district transfer of "colored children"). Included among the pre-*Brown* practices of these districts was the assignment and transportation of black students living in the suburbs to black schools in the City. Moreover, as noted in Part VI of this opinion, governmental policies may have intensified segregation in the St. Louis area.

Adams plaintiffs filed a petition for a writ of certiorari, which this Court denied. *Adams* v. *United States*, ____ U.S. ____, 101 S. Ct. 88, 66 L. Ed.2d 29 (1980).

The City Board timely submitted to the District Court its plan for desegregation of the St. Louis City public schools. On May 21, 1980, the District Court approved the plan, with minor modifications. *Liddell* v. *Board of Education*, 491 F. Supp. 351 (E.D. Mo. 1980). In paragraph 12 of its order approving the plan, the District Court stated:

> The State defendants, the United States and the St. Louis Board of Education are ordered and directed as follows:
>
> a) To make every feasible effort to work out with the appropriate school districts in St. Louis County and develop, for 1980-81 implementation, a voluntary, cooperative plan of pupil exchanges which will assist in alleviating the school segregation in the City of St. Louis, and which also insures that inter-district pupil transfers will not impair the desegregation of the St. Louis school district ordered herein, and submit such plan to the Court for approval by July 1, 1980.
>
> b) To develop and submit to the Court by November 1, 1980, a plan for the consolidation or merger and full desegregation of the separate vocational educational programs operated by the Special District of St. Louis County and the school district of the City of St. Louis, for implementation in the 1981-82 school year.
>
> c) To develop and submit to the Court by November 1, 1980, a suggested plan of inter-district school desegregation necessary to eradicate the remaining vestiges of government-imposed school segregation in the City of St. Louis and St. Louis County.

491 F. Supp. at 353.

The District Court then addressed the liability of the State of Missouri and various state officials and agencies and concluded:

> In sum, the State defendants stand before the Court as primary constitutional wrongdoers who have abdicated their affirmative remedial duty. Their efforts to pass the buck among themselves and to other state instrumentalities must be rejected.

Id. at 360. The Court ordered the State to fund one-half of the desegregation budget, up to a maximum of eleven million dollars.

The State of Missouri and three parent groups appealed from the District Court order. The State of Missouri challenged the above-recited provisions of paragraph 12 of the District Court's May 21, 1980 order and argued that the District Court was without authority to order the preparation of interdistrict desegregation plans unless and until the affected school districts in St. Louis County are joined as parties to the lawsuit. The Eighth Circuit rejected this argument and affirmed, finding that the interdistrict plan called for by a paragraph 12(a) was permissible because it is "voluntary" and that the interdistrict plan called for by paragraph 12(c) was permissible "to the extent any such segregation was imposed by the State or other defendants, and to the extent those defendants have the power to remedy the violation." *Liddell, et al.* v. *Board of Education, et al.*, Nos. 80-1458, 80-1494, 80-1531, 80-1599, and 80-1735 (8th Cir. February 13, 1981) (Petition at A-15 to A-16).

While the appeal before the Eighth Circuit was pending, the Caldwell group and the City Board each filed motions in the District Court for leave to amend their pleadings to assert claims for interdistrict desegregation relief against some 40 separate and autonomous school districts in suburban St. Louis, St. Charles, and Jefferson Counties.

Also during the pendency of the appeal, the District Court modified paragraph 12(a)-(c) of its May 21, 1980 order to extend the time for filing the plans required to be submitted. In addition, the following paragraph was added to paragraph 12(c):

> On or before February 16, 1981 the State defendants and the St. Louis Board of Education shall prepare and submit to the Court a feasibility plan of inter-district school desegregation involving the St. Louis school district and such suburban school districts, that will provide complete and lasting school desegregation. These considerations may apply to those suburban school districts which are not necessarily confined to the suburban districts located in St. Louis County but limited only by considerations of feasibility and practicality, including reasonableness of transportation times and distances. This feasibility plan should include educational and ancillary components such as those outlined in the Court of Appeals' opinion of March 3, 1980 in this case, *and should specifically include pupil assignment and administrative reorganization provisions.* (Emphasis added).

Petition at A-43.

By order of March 4, 1981, the District Court compelled the State Defendants to prepare a "voluntary" interdistrict plan pursuant to paragraph 12(a) of the District Court's May 21, 1980 order within 60 days or face the possibility of being held in contempt of court. Further, the District Court said that if the "voluntary" plan is not submitted, "[t]his Court will be left no alternative but to adopt a plan *to remedy the effects of constitutional violations.*" Petition at A-59 to A-60 (emphasis added).

On May 4, 1981, the City Board and the United States Department of Justice filed a joint plan for voluntary interdistrict desegregation and the State of Missouri filed a similar, but separate, voluntary plan.

On May 11, 1981, hearings were begun on the issues relating to the merger or consolidation of the vocational programs of the Special School District of St. Louis County with the City Board. The parties have presented a consent decree relating to the Special School District and paragraph 12(b), the terms of which have been approved by the District Court as a vocational plan under paragraph 12(b). Petition at A-65 *et seq.*

On July 2, 1981 Judge Hungate ordered the implementation of a voluntary interdistrict desegregation plan beginning with the start of the 1981-1982 school year. He gave all school districts in the metropolitan area until August 6, 1981 to declare their intentions regarding participation. (Petr. Supp. Br. App. G).

On July 31, 1981 the suburban Kirkwood School District R-7, the first of four suburban districts to conditionally agree to participate in Judge Hungate's plan, filed its conditional agreement to participate in the July 2, 1981 Voluntary Desegregation Plan, stating as one of its reasons for doing so:

> 3. If participation by the District would decrease the possibility of a mandatory plan or other court order adverse to this District, it would be to the advantage of this District to become a participant. (App. A).

On August 24, 1981 Judge Hungate ordered the four suburban school districts which had conditionally agreed to the Judge's voluntary interdistrict plan, to implement that plan as a pilot project. Pending motions to make these districts party-defendants, and motions relating to discovery were stayed only as to these districts for as long as they "participated in good faith to achieve a level of integration satisfactory to the Court." (Petr. Supp. Br. App. H). Two days later a fifth suburban school district was admitted to the voluntary plan and the protections provided thereto, upon its written argument to the

Court that its conditional rejection of the voluntary plan was comparable to the conditional acceptance of that plan by one of the four other districts admitted to the plan.

In another order dated August 24, 1981, Judge Hungate said:

> To foster voluntary, cooperative planning under paragraph 12(a) of Judge Meredith's order dated May 21, 1980, as affirmed by the United States Court of Appeals for the Eighth Circuit, this Court deferred ruling on the separate motions of the City Board and Caldwell (to file cross claims against and add the suburban school districts as defendants). (Petr. Supp. Br. App. I).

Continuing on in this August 24, 1981 Order, the Judge referred to the fact that only four suburban St. Louis County school districts conditionally agreed to participate in the paragraph 12(a) voluntary plan, and said:

> In light of the overwhelming rejection of the 12(a) voluntary plan, the Court is compelled to begin proceedings on a mandatory interdistrict plan pursuant to paragraph 12(c) . . . *On February 13, 1981, the United States Court of Appeals for the Eighth Circuit affirmed this Court's power to order a mandatory interdistrict remedy.* (Emphasis added).

* * * *

Expressly

> [f]or purposes of Judge Merdith's directive in paragraph 12(c) to develop a compulsory interdistrict remedy:

Judge Hungate ordered that (1) the motions of the Board of Education for the City of St. Louis and the Caldwell plaintiff group to file crossclaims against and to join as parties defendant seventeen school districts in the County of St. Louis, including the School District of the City of Ladue, "which are necessary parties for a complete determination of this lawsuit under

paragraph 12(c) of Judge Meredith's Order dated May 21, 1980, as affirmed by the United States Court of Appeals for the Eighth Circuit", be granted, (2) discovery was to be completed within ninety days "except for good cause shown", (3) the State defendants, the United States, and the St. Louis Board of Education were:

> To develop and submit to the Court by February 1, 1982, a suggested plan of inter-district school desegregation necessary to *eradicate the remaining vestiges of government-imposed school segregation in the City of St. Louis and St. Louis County.* (Emphasis added),

and (4) a hearing "on the 12(c) aspects of this cause, involving both alleged constitutional violations and proposed remedies" was set for March 1, 1982. (Petr. Supp. Br. App. I).

Judge Hungate introduced his August 25, 1981 Order containing instructions to his court-appointed experts with this preface:

> To provide expert assistance to this Court in developing *and implementing* a mandatory, inter-district desegregation remedy pursuant to paragraph 12(c) of Judge Meredith's order dated May 21, 1980, as amended, and as affirmed by the United States Court of Appeals for the Eighth Circuit. (Emphasis added)
>
> IT IS HEREBY ORDERED that the educational experts appointed by the Court on August 1, 1981 . . . be and they are directed to begin assembling data necessary for devising a mandatory interdistrict remedy pursuant to paragraph 12(c) for presentation to the parties for implementation in the 1982-83 school year.
>
> IT IS HEREBY ORDERED that on or before September 7, 1981, the experts shall file a proposed timetable for outlining the broad parameters of a 12(c) mandatory inter-

> district plan. The framework shall be submitted to the Court before the expiration of their 90-day appointment, November 16, 1981. (Petr. Supp. Br. App. J).

On September 3, 1981, the United States of America moved to strike the aforesaid portion of Judge Hungate's August 24, 1981 Order which sought to implement paragraph 12(c) of Judge Meredith's May 21, 1980 Order by directing the State defendants, the United States, and the St. Louis Board of Education

> To develop and submit to the Court by February 1, 1981, a suggested plan of interdistrict school desegregation necessary to eradicate the remaining vestiges of government-imposed school segregation in the City of St. Louis and St. Louis County.

The United States argued that "it is unclear as to what, if any, "government-imposed" segregation 12(c) plans are to be addressed." The United States explained that prior to May 21, 1980, it had opposed the initial paragraph 12(c) language because, *inter alia,* "there did not exist a sufficiently comprehensive predicate of court findings of interdistrict violations or interdistrict effects of intradistrict violations to justify an area wide plan of interdistrict relief." (App. B).

The State of Missouri and the various individual defendants who are officials of the State of Missouri (collectively, "the State Defendants") have filed a petition for a writ of certiorari to review the Eighth Circuit's decision.

REASONS FOR GRANTING WRIT

1. The Decision Below Raises Issues of Great Importance Regarding the *Exercise of Post-Remedial Jurisdiction By Lower Federal Courts.*

Post-remedial guidelines are of historic importance to this court. *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 5, 6(1971). This Court has said that once liability is determined, the district court must develop and implement a constitutionally acceptable plan, and must retain jurisdiction to insure that the plan is operated in a constitutionally permissible fashion. *Raney* v. *Board of Education of Gould Sch. Dist.,* 391 U.S. 443, 449 (1968). The retention of jurisdiction is also needed to protect the operation of the plan from interference not only from its participants but also from third parties. *Griffin* v. *County School Bd. of Prince Edward County,* 377 U.S. 218 (1964).

Here, however, the lower courts have taken a far differenct view of the district court's power following adoption of a constitutionally acceptable intradistrict desegregation plan.[1] Here

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[1]The Courts' approach appears to have had its genesis in the court-appointed expert's conclusion that the most stable plan would be a metropolitan wide plan involving suburban school districts. *Adams* v. *United States,* 620 F.2d. 1277, 1294 (n. 27) (8th Cir. 1980). Seemingly with Dr. Orfield's conception of the "ideal" plan in mind, the Court of Appeals *suggested* to the City Board the development and implementation of an interdistrict student exchange and transfer program in cooperation with the suburban school districts of St. Louis County, the State Board of Education and the United States. *Adams,* 620 F.2d. at 1296. Obviously the *most* stable plan would be a statewide plan. Flight would result only by entry in private school or by departure fro[illegible] the state. However, stability is not the equivalent of constitutionality, and this Court has indicated that constitutional desegregation plans do not have to protect against future demographic instability in the urban area. *Swann,* 402 U.S. at 31, 32.

the court ordered the implementation of a plan to cure intradistrict segregation found to exist in the City Schools but at the same time exceeded its continuing jurisdiction by ordering in paragraphs 12(a) and 12(c) of the May 21, 1980 Order the preparation of plans involving the school districts of St. Louis County.[2] Evidently the lower courts believed that the intradistrict plan of desegregation could be made more constitutional or better through the introduction of white county school children into the North St. Louis City Schools which, because of the small number of white students attending the City Schools, remain virtually all black. This Court has never indicated its willingness to sanction such methods to improve upon already constitutionally sufficient plans of desegregation.[3]

We are not aware of any other case in which this novel and unchartered course of action undertaken by the lower courts in this case has been attempted.[4] We strongly urge this Court now

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[2]The Court of Appeals approved these orders apparently based on that court's view that the constitutional intradistrict plan does not offer an "optimal" degree of actual integration, and the 12(a) and 12(c) orders were essential to provide more integration with a more constitutional plan. (*Liddell*, Petition A-11).

[3]This Court's decision in *Milliken* v. *Bradley* (I), 418 U.S. 717 (1974) establishes that the federal courts have no obligation to seek out remedies involving areas beyond the boundary lines of a predominately black urban school district in order to find and put into operation a constitutionally acceptable desegregation plan for that urban district. And *Milliken* (I) makes clear that a finding of intradistrict liability against the State does not impose any such obligation on the federal courts. Furthermore, *Swann*, 402 U.S. at 24, tells us that racial balancing is not a necessary ingredient of a constitutionally acceptable desegregation plan.

[4]These orders in effect constitute an invitation to the filing of claims seeking an interdistrict remedy because they announce that the federal court believes an interdistrict remedy is needed. The Order of August 24, 1981 (Pet. Supp. Br. App. I) joining with paragraph 12(c) the interdistrict claims alleged in the amended pleadings of the Board of Education of the City of St. Louis and the Caldwell plaintiffs-

to determine whether that course of action is within the power of the federal courts in an intradistrict desegregation case following the adoption and placement into operation of a constitutionally acceptable intradistrict desegregation plan.[5]

2. The Decision Below Raises Questions of Exceptional Importance Regarding *Federal Court Interference With the Affairs of Local School Districts.*

This Court has repeatedly cautioned the lower federal courts in desegregation cases about the exercise of power over public schools and their affairs. Such power can be invoked only after the finding of a constitutional violation, *Swann,* 402 U.S. at 16; *Milliken* v. *Bradley* (II) 433 U.S. 267, 282 (1977); *Hills* v. *Gautreaux,* 425 U.S. at 293. While paragraphs 12(a) and 12(c) of the District Court's May 21, 1980 Order compel no action by the suburban school districts, it is a travesty to say they are

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intervenors suggests that the district court recognized that the court could not proceed under 12(c) without such claims. Furthermore, the orders suggest a prejudgment by the lower courts on that issue because there was no discernable basis in the *Liddell* record for concluding that an interdistrict remedy would be appropriate and constitutional.

[5]Some of the parties in this case take the position that *Hills* v. *Gautreaux,* 425 U.S. 284 (1976), supports the imposition of a remedy beyond the geographical area (City of St. Louis) in which the violation occurred because the State of Missouri, along with the City of St. Louis school district, was found responsible for failing to dismantle the dual system in the City. There are many reasons that *Hills* is inapposite here, but the definitive reason is that in *Hills* no remedy short of the one there in question had been found to be constitutional. In this case, an intradistrict remedy has been found to be constitutional.

unaffected.[6] In the face of paragraphs 12(a) and 12(c), the suburban districts have been forced to expend large sums of public funds to ascertain how they are affected and what their rights are in this procedurally shocking case. Boards of education, administrators and school attorneys have had to divert enormous amounts of time to these issues, and the order has generated much community dissension and disharmony. Furthermore, the respect which school district constituents have for the courts was understandably shaken when a plethora of court orders requiring suburban interdistrict desegregation planning for their school districts preceded rather than followed any trial of their district. The judicial system, they believed, was not supposed to work that way.

There has also been a blatant effort on the part of the district court to use the threat of the imposition of a mandatory interdistrict plan to force the county school districts to accept the court's July 2, 1981 voluntary plan under paragraph 12(a). This deplorable attempt met with some success, but that success was achieved only because the court afforded the five volunteering districts some immunity from mandatory interdistrict proceedings. (Pet. Supp. Br. App. H).

This flagrant interference of the lower court with the affairs of the St. Louis County School Districts has been done without a finding against the local county districts of any constitutional

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[6]By either version of paragraph 12(c), a plan is required which assumes the existence of violations on the part of the suburban districts. The May 21, 1980 version calls for the eradication of "the remaining vestiges of government imposed school segregation in the City of St. Louis and St. Louis County." The September 17, 1980 version calls for specific pupil assignment and administrative reorganization. Thus without their having been ordered to do anything, the very existence of the suburban school districts is threatened. Furthermore, the Court of Appeals has recognized that these orders involve the suburban school districts. *Liddell,* (Petition at A-14, n.5).

violation and without a finding against the State of an interdistrict violation.[7]

CONCLUSION

We submit that the foregoing establishes the necessity of limiting the post-remedial jurisdiction in intradistrict school desegregation cases (absent appropriate pleadings, hearings and findings on interdistrict violations) to the protection and supervision of a constitutionally acceptable intradistrict desegregation plan. Federal judges who are of the opinion that a constitutional intradistrict plan for a predominately black urban school district will not provide optimal integration, and who therefore conclude that interdistrict remedies are desirable, should not be able to invoke the awesome federal judicial system to "persuade" the metropolitan community to become involved in interdistrict remedies. Absent the finding of an interdistrict violation, the matter of providing the inducement and mechanism for interdistrict student transfers should be left to the state's legislature, which has the obligation for providing free public education under Article IX, Subsection 1(a) of the Missouri Constitution.

Respectfully submitted,

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[7] *Hills* would not give the district court power to compel the State of Missouri to comply with the paragraph 12(c) order because that order contemplates substantial interference with, if not complete elimination of the suburban school districts.

APPENDIX

APPENDIX A

In The United States District Court
For The Eastern District Of Missouri
Eastern Division

Cause No. 72-100-C(4)

Craton Liddell *et al,*
Plaintiffs,

vs.

The Board Of Education Of
The City Of St. Louis, Mo.,
et al,
Defendants.

Conditional agreement to become a participating district during the school year 1981-82 in "An Educational Plan for Voluntary, Cooperative Desegregation of Schools in the St. Louis, Missouri, Metropolitan Area" as approved by the Court in its order of July 2, 1981

Kirkwood School District R-7, subject to the disclaimers herein expressed and acceptance by the Court of the conditions to participation set forth below, hereby agrees during the school year 1981-82 to become a participant under "An Educational Plan for Voluntary, Cooperative Desegregation of Schools in the St. Louis, Missouri, Metropolitan Area", as approved by the Court on July 2, 1981.

Following the decision of the Supreme Court of the United States in *Brown* v. *Board of Education (1954),* Kirkwood School District R-7 promptly proceeded to abandon

maintenance of separate schools for its black and white students, as required by Missouri law, and established a neighborhood school system whereby students were required to attend schools serving the attendance areas where they resided. Subsequent "affirmative action", by "pairing" schools, closing schools, redrawing attendance areas, assignment of students and intra-district busing, has made this District a truly integrated district. As demographic changes have occurred for reasons completely beyond the control of this District, it has made adjustments, beyond those required by federal law, to attempt to maintain a racial balance in its schools.

Therefore, this District believes it has a "unitary" district which more than meets the requirements of federal law.

Furthermore, no actions of this District, either before or after the decision in *Brown*, have in any way contributed to the segregation of races in the School District of St. Louis, Missouri.

For these reasons, this District believes that it should not and cannot be compelled to take any action in relation to the problems of segregation in the schools of the School District of St. Louis.

In any event, because it is not a party to the pending case out of which came the Court's order of July 2, 1981 approving said Plan, this Court, at this time, has no jurisdiction over this District. Participation by this District under said plan shall not be regarded as submission by this District to the Court's jurisdiction in the case in its present posture.

Even if this District were to be made a party to the pending action, or if a new suit were filed naming this District as a party Defendant, no legally effective order could be directed against this District until and unless there shall have been hearings during the course of which this District could defend against the charges and produce evidence in support of its position.

For all of the foregoing reasons, this District believes that any participation it may agree to do under the Plan will be strictly voluntary and that, in participating, it does not subject itself to the jurisdiction of this Court or to any orders which may have been, or may hereafter be, entered by this Court, unless and until this District is made a party to this action or to some other action.

Notwithstanding the foregoing, there are reasons why this District is willing to voluntarily become a participant in the Plan, subject to the disclaimers and conditions herein set forth. Among such reasons are the following:

1. The Board of Education believes that, by thus becoming a participant, there may well be educational advantages to the students of this District, without any additional net cost to this District, or negative impact on our current educational program. What this means is that there will be opportunity to offer educational programs in other districts not now available to our students and opportunity to retain programs within our district that would otherwise to lost due to declining enrollment.

2. If participation by this District would relieve it of the further expenditure of money, time and energy in litigating these issues over an indefinite number of years, it would be to the advantage of the District to become a participant.

3. If participation by the District would decrease the possibility of a mandatory plan or other court order adverse to this District, it would be to the advantage of this District to become a participant.

The conditions on which this District is willing to become a participant, the acceptance of which conditions are a prerequisite to our participation, are as follows:

1. The pending motions to make this District a party defendant in this case would be denied or withdrawn, and any new

litigation which might be filed seeking substantially the same remedy, would be stayed against this District.

2. The effective date of Section III of the Plan (Permissive, Inter-District Transfers to Existing Programs) shall be deferred until after the beginning of the first semester of the 1981-82 school year and shall be accomplished by the beginning of the second semester of said year. There is simply no practical way that this part of the plan can be effectively in place by the opening of the school year 1981-82 and such deferment would enhance its prospects of success.

3. Because this conditional acceptance is based on the Plan as approved by the Court, and because the Court has expressly reserved the right to make changes in the Plan, this District must have the right to withdraw from participation promptly after any modification of the Plan deemed by this District to be substantially disadvantageous to it, as for example, a change in the cost of reimbursement provisions, provided written notice of withdrawal is given within thirty (30) days of such change in the plan. This would be a way of withdrawing in addition to the provisions of the Plan which permit withdrawal for the following school year, provided notice shall have been given prior to March 1 of the current school year.

4. This District would retain the right to limit its acceptance of inter-district transfer students to 50 students the first year, preferably 10 students in each grade level 6 through 10, and, thereafter, one percent of the student enrollment of the District each year until the Plan ratio is reached, even if under the Plan the District were deemed to have space available for a larger number of such students.

The Meacham Part area is and has been an almost totally black residential area within this school district. Recently a new federally subsidized housing project has been constructed in this same area. This new housing likewise is substantially all black

occupied. As a result, within the past three years the district has experienced a substantial increase (from 11.78% to 16.4%) in its black student population which it is still in the process of successfully integrating into its school community. An additional influx of black students beyond the fifty students referred to above could jeapordize all of our positive efforts toward district-wide integration and therefore would be unacceptable to the District.

5. The District shall remain free to close and sell its school buildings and other properties when, in its sole discretion, it has concluded that they are no longer needed for the education of the District's resident students and whose closing and sale would result in a significant financial advantage to the District.

6. In agreeing to become a participant in this Plan, the Kirkwood School District R-7 recognizes the distinction between its voluntary nature and mandatory forced busing to achieve redistribution of students by race. We will oppose action on the part of this court or any other agency of government at any level and will defend our students and parents against any action leading to mandatory busing to the fullest extent. Further, should this district become convinced that participation in this voluntary plan would increase the likelihood of becoming involved in forced busing of students, it reserves the right to terminate such participation.

Respectfully submitted,

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APPENDIX B

In the United States District Court for the
Eastern District of Missouri
Eastern Division

Civil Action No. 72-100C (4)

Craton Liddell, *et al.*,
Plaintiffs,

v.

The Board of Education of the City of
St. Louis, Missouri, *et al.*,
Defendants.

Motion of the United States to Modify Order H(337)81

On August 24. 1981, this Court entered an order (H(337)81) which, *inter alia,* provided that

> IT IS HEREBY FURTHER ORDERED that in accordance with Judge Meredith's order dated May 21, 1980, as amended, that the State defendants, the United States, and the St. Louis Board of Education are ordered and directed as follows:
>
> > To develop and submit to the Court by February 1, 1982, a suggested plan of interdistrict school desegregation necessary to eradicate the remaining vestiges of government-imposed school segregation in the City of St. Louis and St. Louis County.
>
> Order H(337)/81 at 5.

The United States moves the court to alter Order H(337)/81 by either striking the above quoted provision entirely or, in the

alternative, by modifying the language to reflect the changes made in the Court's May 21, 1980, order by this Court's order of September 17, 1980. The United States requests oral argument on this motion.

Respectfully submitted,

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United States Attorney

WM. BRADFORD REYNOLDS
Assistant Attorney General

Joseph Moore
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/s/ Craig M. Crenshaw Jr./ss
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Civil Rights Division
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Washington, D.C. 20530

In the United States District Court for the
Eastern District of Missouri
Eastern Division

Civil Action No. 72-100C (4)

Craton Liddell, *et al.*,
Plaintiffs,

v.

The Board of Education of the City of
St. Louis, Missouri, *et al.*,
Defendants.

Memorandum in Support of Motion of United States to Modify Order H(337)81

On August 24, 1981, this Court entered an order (H(337)81) which, *inter alia,* provided that

IT IS HEREBY FURTHER ORDERED that in accordance with Judge Meredith's order dated May 21, 1980, as amended, that the State defendants, the United States, and the St. Louis Board of Education are ordered and directed as follows:

> To develop and submit to the Court by February 1, 1982, a suggested plan of interdistrict school desegregation necessary to eradicate the remaining vestiges of government-imposed school segregation in the City of St. Louis and St. Louis County.
>
> Order H(337)/81 at 5.

The United States has moved to alter Order H(337)81/ by striking the above quoted provision in its entirely or, failing that, in the alternative, to modify the provision to reflect the changes made in the Court's May 21, 1980, Order by this Court's order of September 17, 1980. This memorandum is submitted in support of that motion.

Statement

The above cited provision parallels paragraph 12(c) of this Court's order of May 21, 1980. At several conferences last summer with the court, the United States and the City Board (both of which had originally opposed the inclusion of pararaph 12(c)) expressed reservations about paragraph 12(c), resulting in a letter to counsel dated September 5, 1980, from Judge Meredith. Pursuant to that letter, counsel met with the Court and produced the order of September 17, 1980, which modified several dates and the terms of paragraphs 12(a) and 12(c).* The September 17, 1980, order modified 12(c) by striking the language of the original 12(c) and substituting therefore the re-

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* This order was entered without objection from counsel for any party as to the modifications no party appealed this modification of paragraph 12.

quirement that the City Board and the State (but not the United States) present a "feasibility plan" of inter-district school desegregation. Through an apparent error in the Court of Appeals clerk's office the September 17, 1980, order was not included in the record on appeal although it had been designated. The issue of the change in the terms of 12(c) was not briefed. Because of this the Court of Appeals in its February 13, 1981, opinion (at slip pp. 19-20) considered the original language of paragraph 12(c) even though that language had been superceded in the interim. The Court of Appeals noted that it read the term "government-imposed" in 12(c) to mean found by a court to have been "government-imposed" by the State or other defendants.

On February 27, 1981, Cadlwell, who had been one of the original advocates of 12(c), moved this Court to "terminate" further reporting under 12(c). On June 23, 1981, this Court granted that motion although it retained jurisdiction to enter 12(c) "related" orders. Finally this Court on August 24, 1981, *sua sponte,* reinstated the long discarded formulation of paragraph 12(c) as contained in the May 21, 1980 order.

Argument

The United States urges the Court to delete the resurrected 12(c) language in its entirety. Failing that, the Court should adopt the modified language of 12(c) which the Court endorsed on September 17, 1980. The rationale for each action is separate and independent.

1. Prior to the May 21, 1980, order the United States took the position that the initial 12(c) language was inappropriate, because, among other reasons, there did not exist a sufficiently comprehensive predicate of court findings of interdistrict violations or interdistrict effects of intradistrict violations to justify an areawide plan of interdistrict relief. The Eighth Circuit in affirming the 12(c) provisions of the May 21, 1980 order added the gloss that it was only as to that "government imposed" segrega-

tion which had been found *by a court* to have been government imposed that 12(c) was addressed. The basic problem here is that it is unclear as to what, if any, "government imposed" segregation 12(c) plans are to be addressed. Without further explicit direction from the Court we are drawn again to the conclusion reached last September, *viz.*, 12(c) as presently constituted cannot be executed. Therefore it should be deleted until this Court has made explicit findings, after appropriate hearings, as to what, if any, constitutional violations are meant to be extirpated by 12(c).

2. Alternatively, if the Court wishes to adopt the formulation of 12(c) as expressed in the Court's September 17, 1980 order then we stress the necessity of eliminating the United States from the reporting provision. The reasons for this are twofold. First in a normal case, a modification of a Court order assented to by each party and ratified by the court would not unilaterally be set aside by the court eleven months later absent some finding relevant to the issue, expecially without prior notice and an opportunity to be heard. Here, there have been no such findings or an opportunity to be heard.

The second reason why the Court should not require the United States to file a 12(c) plan is that the Court has no authority to do so absent the assent of the United States. Under the Court's findings, if any obligation exists to develop a 12(c) plan — which we dispute — it is an obligation of the State's and/or the Board's. While the United States is always available to assist the Court upon request and has done so upon many occasions in this case, this is not the same thing as being required by order to do that for which there is no support in the record. Nor is the United States currently seeking a mandatory interdistrict remedy. Without one of these predicates, we believe that the United States should not be required to participate in the formulation of a 12(c) plan.

Conclusion

For the foregoing reasons, we respectfully request the Court to strike the language in question, or at a minimum, modify the requirements pursuant to this Court's earlier order of September 17, 1980 which *inter alia* deleted any requirement of United States participation in 12(c) planning.

Respectfully submitted,

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